ORAL ARGUMENT NOT YET SCHEDULED

No. 12-5150

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MINGO LOGAN COAL COMPANY,

Plaintiff-Appellee,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Columbia
Case No. 1:10-cv-00541-ABJ (Hon. Amy Berman Jackson)

BRIEF OF PLAINTIFF-APPELLEE MINGO LOGAN COAL COMPANY

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Dated: September 4, 2012

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Plaintiff-Appellee Mingo Logan Coal Company states as follows with respect to this case:

A. Parties, Intervenors, and Amici

Plaintiff-Appellee Mingo Logan Coal Company is a subsidiary of Arch Coal, Inc. Defendant-Appellant is the United States Environmental Protection Agency. At this time, there are no intervenors. All parties and amici that appeared before the district court, *Mingo Logan Coal Company Inc. v. U.S. Environmental Protection Agency*, No. 1:10-cv-00541-ABJ (D.D.C.), are listed in the Brief of Defendant-Appellant United States Environmental Protection Agency (EPA Brief). Except for the following, all parties and amici appearing in this court are listed in the EPA Brief:

- Huffman, Randy C., acting in his official capacity as Cabinet Secretary for the West Virginia Department of Environmental Protection and the State of West Virginia

B. Ruling Under Review

The ruling under review is an Order and Memorandum Opinion issued by the Honorable Amy Berman Jackson of the U.S. District Court for the District of Columbia on March 23, 2012 in *Mingo Logan Coal Company Inc. v. U.S. Environmental Protection Agency*, No. 1:10-cv-00541-ABJ, [Docs. 86 and 87.]

The opinion will be published at __ F. Supp. 2d __, 2012 WL 975880 (D.D.C. 2012).

C. Related Cases

This case was not previously before this Court or any other appellate court. Several amici participating in this appeal have challenged the U.S. Department of the Army Permit No. 199800436-3, the Clean Water Act section 404 permit that is relevant to this case. *See Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng'rs*, No. 3:05-cv-00784 (S.D. W. Va. filed Sept. 22, 2005). Plaintiff-Appellee Mingo Logan Coal Company is an Intervenor-Defendant in that case. Counsel is not aware of any other related proceedings currently pending before this or any other court, as defined by Circuit Rule 28(a)(1)(C).

DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Plaintiff-Appellee Mingo Logan Coal Company (Mingo Logan) states that it is a wholly-owned subsidiary of Arch Coal, Inc.

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404(b)(1) Guidelines	40 C.F.R. pt. 230
404(q) MOA	Clean Water Act Section 404(q) Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army (Aug. 11, 1992)
Act	Clean Water Act
Agency	U.S. Environmental Protection Agency
APA	Administrative Procedure Act
Corps	U.S. Army Corps of Engineers
CWA	Clean Water Act
EIS	Environmental Impact Statement
EPA	U.S. Environmental Protection Agency
JA	Joint Appendix
NEPA	National Environmental Policy Act
Permit	U.S. Department of the Army Permit No. 199800436-3
RHA	Rivers and Harbors Act of 1890, 1899, and 1905 (collectively)
SMCRA	Surface Mining Control and Reclamation Act
WVDEP	West Virginia Department of Environmental Protection

STATEMENT OF ISSUES

Congress gave the U.S. Army Corps of Engineers (the Corps) exclusive authority over permits for the discharge of dredged and fill material under section 404 of the Clean Water Act (CWA or Act). In CWA section 404(c), Congress authorized the U.S. Environmental Protection Agency (EPA or Agency) to "prohibit the *specification* (including the withdrawal of specification) of any defined area as a disposal site, and … to deny or restrict the use of any defined area for *specification* (including the withdrawal of specification) as a disposal site … ." 33 U.S.C. § 1344(c) (emphases added). But section 404(c) gives EPA no power to modify, suspend or revoke "permits." Did EPA exceed its authority under section 404(c) by purporting to substantially modify, more than four years after its issuance, Mingo Logan's Corps-issued section 404 permit for the Spruce mine?

STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the Statutory and Regulatory Addendum.

PRELIMINARY STATEMENT

In January 2007, after ten years of study, the Corps granted Mingo Logan a permit (Permit) under CWA section 404 that authorized the discharge of dredged or fill material into parts of Pigeonroost Branch, Oldhouse Branch and Seng Camp Creek at the Spruce No. 1 coal mine (Spruce) in West Virginia. During those ten years, dozens of state and federal regulators—including EPA—exercised authorities carefully prescribed in numerous environmental laws. EPA could have objected at various points, and even could have prohibited the use of the disposal sites the Corps had specified, thereby blocking the Permit. But EPA did not do so. So the Corps issued the Permit, and Mingo Logan has operated in compliance with the Permit ever since.

Yet more than four years after the Corps issued the Permit, EPA—in an unprecedented action—attempted to modify the central terms of the Permit by eliminating the authority to discharge fill into Pigeonroost and Oldhouse Branches—reducing by nearly 88 percent Mingo Logan's operations at Spruce. EPA attempted this action even though it acknowledged that Mingo Logan was in compliance with the Permit and even though the Corps had concluded that modification of the Permit was not justified under applicable regulations.

EPA's supposed authority for its action is CWA section 404(c), which authorizes EPA "to prohibit the *specification* (including the withdrawal of

specification) of any defined area as a disposal site, and … to deny or restrict the use of any defined area for *specification* (including the withdrawal of specification) as a disposal site … ." 33 U.S.C. § 1344(c) (emphases added). EPA reads this provision to give it plenary authority to unilaterally modify or revoke a section 404 *permit*, even though section 404(c) does not mention the word "permit" or make any mention of the "stunning power" EPA claims. [Doc. 87, Memorandum Opinion (Op.) at 10].

Section 404(c) cannot be read as EPA reads it here. Congress gave the Corps, not EPA, final authority to issue, oversee and enforce section 404 permits. While EPA plays an important role in the formulation of those permits, that role ends once a permit issues. Allowing EPA perpetual and unrestricted license to modify a permit after its issuance—even when the agency authorized to modify the permit has concluded there are no grounds to justify doing so—would destroy the certainty that the permit is intended to provide and upset Congress's allocation of regulatory authority among the Corps, the States and EPA. Congress did not give EPA such unbridled power.

The district court agreed. In a thorough, well-reasoned opinion, the court concluded, based on the text of section 404(c), the language and structure of the statute as a whole, and the legislative history, that section 404(c) does not authorize EPA to revoke or modify a Corps-issued permit. And to the extent the statute

could be deemed ambiguous, the court concluded that, even according some measure of deference, EPA's interpretation of section 404(c) was unreasonable.

On appeal, EPA repackages many of the arguments the district court considered and rejected. EPA advances an untenable textual argument that ignores Congress's choice of words in section 404(c) and creates conflict with other provisions in the Act. EPA downplays the legislative history that shows Congress's expectation that EPA would act under section 404(c), if at all, in the pre-permit period. But EPA identifies nothing in the legislative history supporting its interpretation. And EPA argues that its interpretation is entitled to full *Chevron* deference, even though this circuit has held repeatedly that such deference is inappropriate where multiple agencies administer a statute. And even if *Chevron* applies, EPA's interpretation is patently unreasonable. The district court rejected each of EPA's arguments; this Court should do so as well.

EPA also makes new arguments and asks the Court to consider issues the district court did not reach. For example, for the first time, EPA argues that the Fourth Circuit "held" that EPA could veto an issued section 404 permit. The Fourth Circuit held no such thing. The cited decision did not even discuss the temporal limit of EPA's section 404(c) authority.

EPA has exceeded its statutory authority. The district court's judgment should be affirmed.

STATEMENT OF THE CASE AND FACTS

I. Statutory and Regulatory Background

A. The Basic Structure of the CWA—All Discharges From Point Sources Are Prohibited, Except as Authorized by a "Permit."

The CWA's conceptual foundation is its sweeping premise that any discharge of pollutants from point sources to navigable waters is unlawful, unless made pursuant to a permit that incorporates project-specific conditions and limitations imposed by CWA §§ 301, 302, 306 and 307. *See* 33 U.S.C. §§ 1311(a), 1342(a), 1344(a) and 1328(a). Earlier water quality acts focused on whether a given discharge negatively impacted water quality.[1] But this framework proved unworkable, primarily because it included no mechanism to enforce the adoption of—or compliance with—water quality standards.[2]

The 1972 CWA Amendments changed all that.[3] Section 301(a) "established a default regime of strict liability." *Piney Run*, 268 F.3d at 265. All discharges are

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[1] *See generally EPA v. California ex. rel. State Water Res. Control Bd.*, 426 U.S. 200, 202 (1976) (describing pre-1972 regime).

[2] "[I]t was often difficult to formulate precise water quality standards and even more difficult to prove that a particular operator's discharge reduced water quality below these standards." *Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty., Md.*, 268 F.3d 255, 264 (4th Cir. 2001).

[3] *See* Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251 *et seq.*).

illegal unless made in compliance with one of the Act's exceptions. And the primary exceptions involve "permits" issued under either section 402 or section 404. *See Natural Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369, 1374 (D.C. Cir. 1977); *see also Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 489 (1987). Once issued, a permit establishes definitively the CWA requirements applicable to the covered activity for the term of the permit. Compliance with an issued permit is deemed compliance with the CWA. 33 U.S.C. § 1342(k); 33 U.S.C. § 1344(p). *Natural Res. Def. Council, Inc. v. EPA*, 822 F.2d 104, 111 (D.C. Cir. 1987).

CWA permits remain the law as to the covered discharges even if regulatory standards later change. "In general, permits are not modified to incorporate changes made in regulations during the term of the permit. This is to provide some measure of certainty to both the permittees and the Agency during the term of the permits." *See* 49 Fed. Reg. 37,998, 38,045 (Sept. 26, 1984). Thus, "permit terms and conditions remain enforceable unless and until they are modified, revoked, or judicially or administratively stayed." 44 Fed. Reg. 32,854, 32,869 (June 7, 1979). EPA itself has cautioned that "any attempt to apply limitations or standards which were not in effect at the time of permit issuance constitutes unauthorized overreaching by the permit issuing authority." *Id.*

B. Congress Authorized the Corps—not EPA—to Administer the Permitting Program for Discharges of Dredged or Fill Material at Specified Disposal Sites.

Having established discharge permits as the CWA's central regulatory mechanism, Congress then created two distinct permitting programs: section 404, which governs the discharge of "dredged or fill material," and section 402, which regulates discharges of all other pollutants. *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 273-74 (2009). Section 404 authorizes only the Corps to "issue permits … for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a); *see Coeur Alaska*, 557 U.S. at 273-74 (describing the Corps's authority under section 404); *Nat'l Mining Ass'n v. Jackson*, No. 1:10-cv-1220-RBW, 2011 WL 124194, at *39 (D.D.C. Jan. 14, 2011) ("The Corps has sole authority to issue Section 404 permits.").

Congress purposefully made the Corps, not EPA, responsible for section 404 permits, because the Corps's responsibilities for maintaining the nation's navigable waterways had given it long experience with regulating dredge and fill activities and the disposal of dredged spoil in navigable waters.[4] The CWA section 404 program would complement and extend the Corps's continuing authorities under

[4] *See* Rivers and Harbors Acts of 1890 and 1899, 33 U.S.C. §§ 401, 403, and 1905 Rivers and Harbors Act, 33 U.S.C. § 419 (collectively, the RHA).

the RHA, which already required the Corps to review the impact on water quality at a proposed disposal site. *See* 33 C.F.R. §§ 209.120(d)(8); 209.120(d)(11) (1972). By 1972, the Corps had decades of experience over dredging in navigable waters and the associated discharge of dredged spoil, including broad authority to specify sites for disposal of dredged material. After considerable debate about whether dredge and fill activities should be regulated along with other pollutants under section 402 (and thus subject to the program to be overseen by EPA), Congress concluded that the Corps should retain that responsibility and have exclusive authority over section 404 permits.[5]

Consistent with this fundamental decision, Congress empowered the Corps to issue section 404 permits at specified disposal sites. 33 U.S.C. § 1344(a). The Corps specifies disposal sites for the permits based on the Corps's application of the section 404(b)(1) Guidelines. 33 U.S.C. § 1344(b). The Corps also enforces

[5] Congress rejected a version of the legislation that would have treated dredged and fill material the same as any other pollutant. The Senate version of the Act, S. 2770, 92d Cong., 1st Sess. (1971), *reprinted in* 2 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 at 1534-1723 (Jan. 1973) (LEGISLATIVE HISTORY 1972), treated the discharge of dredged or fill material the same as the discharge of every other pollutant, all of which would have been governed by the proposed section 402, making EPA the responsible permitting authority. *Id.* at 1685-92. The House version, which prevailed, kept authority over dredged and fill material with the Corps. *See* H.R. 11896, 92d Cong., 2d Sess. (1971), *reprinted in* 1 LEGISLATIVE HISTORY 1972 at 893-1110.

compliance with the terms of Corps-issued permits. 33 U.S.C. § 1344(s). And concomitant with its power to issue and enforce section 404 permits, the Corps can modify, suspend or revoke those permits after they are issued. 33 C.F.R.§ 325.7; *see also* 44 Fed. Reg. 58,076, 58,077-78 (Oct. 9, 1979) (EPA rejects proposed version of 40 C.F.R. § 231.7 that would have claimed authority to suspend permits because EPA doubted it had the authority to suspend permits). EPA has none of these powers over Corps-issued permits.

C. EPA's Limited Role in the Section 404 Program

Congress gave EPA only a limited role under section 404 and carefully prescribed the timing and substance of EPA's involvement. After consultation with the Corps, EPA promulgates guidelines that the Corps applies to specify disposal sites. *See* 33 U.S.C. § 1344(b)(1); 40 C.F.R. pt. 230. But the Corps (not EPA) applies the section 404(b)(1) Guidelines to "specify" disposal sites for the discharge of dredged or fill material that will be authorized by a permit. And the Corps alone drafts section 404 permits and writes their conditions.

EPA also provides comments to the Corps during the permitting process. *See* 33 C.F.R. pt. 325. If EPA has concerns that a proposed discharge will have "substantial and unacceptable" impacts to "aquatic resources of national importance," EPA may elevate a permit decision to the Division and Headquarters levels of the Corps. *See* 33 U.S.C. § 1344(q); Clean Water Act Section 404(q)

Memorandum of Agreement Between the EPA and the Dep't of the Army at Part IV ¶ 3(a) (Aug. 11, 1992) (404(q) MOA), *available at* http://www.epa.gov/wetlands/regs/dispmoa.html. But the Corps "is *solely responsible* for making final permit decisions pursuant to … Section 404(a) … ." 404(q) MOA at Part IV ¶ 1 (emphasis added).

The statute also gives EPA one final opportunity to "veto" the issuance of a permit when it believes the discharges proposed to be authorized would have certain "unacceptable" environmental consequences. 33 U.S.C. §1344(c). That provision—section 404(c)—authorizes EPA to "prohibit," "deny," or "restrict" the "specification (including the withdrawal of specification) of any defined area as a disposal site." By its terms, it gives EPA no authority over "permits."

II. Factual Background

Congress specifically approved the mining process used at the Spruce Mine in the Surface Mining Control and Reclamation Act (SMCRA). *See* 30 U.S.C. § 1265(b)(22); 30 C.F.R. §§ 816.71-73. Under that process, soil and rock (called "spoil" or "overburden") are removed to expose coal deposits beneath. When coal extraction ends, some of that overburden is used to recontour the terrain. But excess overburden must be placed in most instances in adjacent hollows. *See Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 190 (4th Cir. 2009) (*OVEC*) (describing surface mining methods). These hollows may contain

streams that qualify as "navigable waters" regulated by the CWA. As a result, Mingo Logan had to obtain a permit under CWA section 404. 33 U.S.C. § 1344(a).

The Corps issued that permit in January 2007, the last of several permits in a decade-long process involving a host of State and federal regulators under an intricate array of environmental laws. West Virginia's Department of Environmental Protection (WVDEP) issued permits under SMCRA and CWA section 402, and issued the water quality certification under CWA section 401 required for the Corps to issue the section 404 permit. The Corps also prepared a full environmental impact statement (EIS) under the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* (NEPA). EPA was involved every step of the way.

A. The Spruce Permitting Process

1. West Virginia Issues a SMCRA Permit.

SMCRA regulates the overall construction, operation and reclamation of surface coal mines. 30 U.S.C. §§ 1201 *et seq*. SMCRA controls the environmental impacts of surface coal mining, including the ultimate return of excess rock and dirt to the mined area and adjacent hollows. West Virginia has exclusive authority to issue SMCRA permits on non-federal lands within its borders, and after a

thorough review and extensive public comment, WVDEP granted Mingo Logan its SMCRA permit on November 4, 1998.[6] [AR008277.001-.021].

2. EPA Consents to West Virginia's Issuance of a Section 402 Permit Authorizing Discharges from Outfalls.

Spruce also required a permit under CWA section 402. In accordance with SMCRA, the Spruce design included an extensive flow control scheme in which water is channeled from the mine and discharged through regulated outfalls into downstream waters. The discharges from the outfalls are governed by section 402, and WVDEP is responsible for issuing section 402 permits. Before it could issue a section 402 permit for Spruce, WVDEP had to ensure, among other things, that the discharges and their downstream effects would comply with applicable effluent limitations and West Virginia's water quality standards.

Mingo Logan first applied for a section 402 permit in 1997. [AR008062; AR043101-269]. WVDEP reviewed the application and forwarded the proposed permit to EPA. [AR008397]. *See* 33 U.S.C. § 1342(d)(1); 40 C.F.R. § 123.41. EPA objected, [AR008404], but withdrew its objections when WVDEP agreed to incorporate conditions EPA had proposed. [AR008413-15]. Thus, with EPA's

[6] The Permit was actually issued to Mingo Logan's affiliate, Hobet Mining, Inc. Because this distinction is unimportant in this case, this brief refers only to "Mingo Logan."

consent, [AR008427], WVDEP issued the section 402 permit on January 11, 1999. [AR043101-269].

When WVDEP sought to modify the 402 permit three years later, EPA objected, [AR042908-10], but again withdrew its objections when WVDEP agreed to certain conditions. [AR008437-38; AR008440]. The section 402 permit was thereafter modified and renewed several times without objection by EPA.

3. The Corps Issues the Section 404 Permit.

Mingo Logan originally applied for its section 404 authorization in 1998. [AR002635-66]. In 1999, the Corps concluded that Spruce met the requirements for Nationwide Permit 21. [AR002746-2833]. EPA concurred, noting that the project was consistent with Section 404(e) of the CWA— i.e., the proposed fills would "cause only minimal adverse environmental effects." 33 U.S.C. § 1344(e); [AR002870-71]. A federal court preliminarily enjoined the Corps's approval because of programmatic challenges to Nationwide Permit 21, but that injunction did not address the Corps's and EPA's determination that Spruce's discharges would have only minimal adverse effects. *Bragg v. Robertson*, 54 F. Supp. 2d 635 (S.D. W. Va. 1999).

So Mingo Logan started over. It applied for an individual permit under section 404(a). [AR003052-70]. The Corps conducted a full de novo review of the application and prepared a full EIS in accordance with NEPA. The process

took over seven years, generated an administrative record that spans tens of thousands of pages, and cost Mingo Logan millions of dollars. Throughout, Mingo Logan worked cooperatively with the Corps and EPA. Mingo Logan significantly decreased the proposed scale of its operation, reduced the acreage of affected streams and agreed to additional compensatory mitigation, including stream creation, restoration, and enhancement, in amounts well beyond what EPA and the Corps had previously concluded were sufficient.

In March 2006, the Corps's 1600-page Draft EIS concluded that Spruce "would only contribute minimally to cumulative impacts on surface water quality." [AR012997-98]. EPA commented on the proposed Draft EIS, the published Draft EIS, the proposed Final EIS, and the published Final EIS. The Final EIS devoted 58 pages to EPA's comments and resolved each of EPA's concerns. Through December 2006, EPA and the Corps continued to communicate, and EPA ultimately announced that "we have no intention of taking our Spruce Mine concerns any further from a Section 404 standpoint … ." [AR023085].

WVDEP also participated in the section 404 process. After scrutinizing Mingo Logan's permit application, WVDEP certified under CWA section 401 that the discharges authorized by the section 404 permit would not contribute to a violation of State water quality standards or violate the State's anti-degradation regulations. EPA did not challenge WVDEP's certification.

During this exhaustive process, EPA could have (a) challenged the Corps's EIS by referring it to the White House Council on Environmental Quality, *see* 42 U.S.C. § 7609; 40 C.F.R. pt. 1504; (b) "elevated" the proposed Permit for further review pursuant to section 404(q), *see* 404(q) MOA; or (c) invoked section 404(c) to prohibit, deny, or restrict the disposal sites specified in the permitting process. But EPA did nothing and thus deferred to the Corps's judgment to issue the Permit in January 2007. *See Coeur Alaska*, 557 U.S. at 270.

The Permit authorizes Mingo Logan to discharge dredged and fill material into 8.11 acres of ephemeral and intermittent streams within the mine site. [AR025763]. The Permit also requires Mingo Logan to perform post-project stream restoration and compensatory mitigation. And, significantly, the Permit notifies Mingo Logan of the Corps's enforcement powers under 33 C.F.R. §§ 326.4 and 326.5 as well as its authorities under 33 C.F.R. § 325.7 to suspend, modify or revoke the permit. [AR025765]. There is no mention of section 404(c), nor any suggestion that EPA has authority to suspend, modify or revoke the Permit.

B. EPA Attempts to Revoke the Permit.

Once issued, the Permit immediately became embroiled in pending litigation challenging other surface mining permits in the area. *See Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng'rs*, No. 3:05-cv-00784 (S.D. W. Va. filed Sept. 22,

2005) (Plaintiff's motion for temporary restraining order). The Fourth Circuit upheld the other challenged permits, effectively affirming the Corps's approach in issuing Mingo Logan's Permit. *OVEC*, 556 F.3d at 217. Mingo Logan then moved for summary judgment based on the Fourth Circuit's decision.

On September 3, 2009, over two and a half years after the Corps issued the Permit, EPA asked the Corps to revoke, suspend or modify it, claiming that new information had come to light since the Permit's issuance and thus justified its reconsideration. [AR012754]. The Corps refused. [AR012781-84]. It found that none of the five factors to be considered under its regulations governing suspension, modification or revocation of permits warranted action. [AR012782]. Among other things, the Corps determined that Mingo Logan was complying with the Permit and there had been no new information or change in circumstances or law. *Id.*

EPA then took matters into its own hands. On March 26, 2010, EPA announced that it intended to "veto" the Permit under section 404(c). [AR000004]. EPA published its notice in the *Federal Register* along with its Proposed Determination, which announced EPA's intent to nullify the Permit's authorization to discharge fill material into Pigeonroost Branch, Oldhouse Branch and Seng Camp Creek. 75 Fed. Reg. 16,788 (Apr. 2, 2010). [AR000050-70]. The Corps remained steadfast in its support of the Permit. In response to EPA's September

24, 2010 Recommended Determination, the Corps reiterated that it had "no basis to take any corrective action regarding the 404 permit [it] issued." [AR010659].

Nonetheless, on January 13, 2011, EPA issued its Final Determination, purporting to "withdraw the specification of Pigeonroost Branch, Oldhouse Branch and their tributaries … as a disposal site for dredged or fill material in connection with construction of the Spruce No. 1 Surface Mine, as authorized by DA Permit No. 199800436-3 … ." [AR010108].

III. Proceedings in the District Court

On February 28, 2011, Mingo Logan filed an amended complaint challenging EPA's Final Determination. [Doc. 16]. The amended complaint asserted fourteen separate counts under the Administrative Procedure Act (APA). Count I raised the threshold issue of whether section 404(c) authorized EPA to act after the Corps had issued a permit. The remaining counts addressed specific ways in which EPA exceeded its section 404(c) authority, assuming it had the authority to act post-permit. The parties filed cross-motions for summary judgment on all counts. But because a summary judgment decision in favor of Mingo Logan on Count I would resolve the entire matter, the court heard argument only on Count I.

On March 23, 2012, the court held that EPA had exceeded its authority and vacated the Final Determination. In an exhaustive opinion, the district court concluded that EPA's interpretation of section 404(c) was inconsistent with the

statute's text and the logic and structure of the statute as a whole, and was not supported by the legislative history. Focusing first on the text of section 404(c) itself, the court rejected EPA's insistence that the word "withdrawal" in the two parenthetical phrases and the word, "whenever," supported EPA's interpretation. Whatever the quirks in the drafting of section 404(c), the court emphasized, section 404(c) "only talks about prohibiting, restricting, or withdrawing a *specification*, and it does not give EPA any role in connection with permits." [Op. at 14]. The "specification of disposal sites," the court explained, is a predicate to the issuance of a permit, and once the permit issues, there are no "specifications" as such, but rather terms in an integrated permit that authorizes the discharge of fill material subject to the permit's project-specific conditions.

The court next focused on the dissonance between EPA's interpretation of section 404(c) and other provisions in the CWA. The court noted that EPA's interpretation would allow EPA to prohibit discharges authorized in section 404 permits and thus create conflict with section 404(p), which directs that so long as a permittee complies with its permit's terms and conditions it will be deemed to comply with the Act. [Op. at 15-18]. The court also noted that EPA's interpretation conflicts with section 404(q), which requires the Corps and EPA to resolve disputes expeditiously to assure that permit decisions are made within 90 days of the publication of notice of the permit application. [Op. at 19].

The court next looked to the legislative history and found no support for EPA's interpretation. The court noted that Senator Muskie, chief sponsor of the 1972 CWA Amendments, expected that EPA would act under section 404(c) before the issuance of any permit. And the compromise reflected in the final legislation confirmed for the court that EPA's section 404 responsibilities "were to be limited to those specifically assigned." [Op. at 22].

All of this—the text of section 404(c), the text and structure of the statute as a whole, and the legislative history—satisfied the court that "it could deem EPA's action to be unlawful without venturing beyond the first step of the analysis called for by *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)." [Op. at 2].

The court then considered whether, should the statute be found ambiguous, EPA's interpretation was due any deference and if so, whether that interpretation was reasonable. The court noted first that, where more than one agency administers a statute, one agency's interpretation of an ambiguous statute is entitled to no more than *Skidmore*[7] deference. [Op. at 27]. But to apply even that reduced level of deference, the court had to clarify the interpretation to which EPA

[7] *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (according deference to an agency's interpretation of a statute based on the interpretation's "power to persuade.")

seeks deference. EPA at oral argument made clear that it asked the court to defer to an interpretation that allowed EPA to revoke a permit under section 404(c), even where the information on which that revocation was based was fully considered before permit issuance. [Op. at 30]. The court found that interpretation unreasonable—it was illogical and impractical and "sow[ed] a lack of certainty into a system that was expressly intended to provide finality." [*Id.* at 31].

The court therefore granted summary judgment to Mingo Logan on Count I. The court did not address the substantial issues raised in Counts II through XIV.

SUMMARY OF ARGUMENT

The district court correctly concluded that section 404(c) does not authorize EPA to modify an issued permit.

EPA's interpretation of section 404(c) fails under *Chevron* step one. By its terms, section 404(c) only mentions "specifications," which differ from "permits." Had Congress intended section 404(c) to authorize EPA to modify permits—a "stunning power"—it would have said so clearly and used the word "permit."

Reading section 404(c) to authorize EPA to act post-permit also creates untenable conflict with the plain language of other provisions of the Act as well as the broader structure of the Act as a whole. In particular, sections 404(a), (b), and (s) make the Corps the federal permitting authority, not EPA. Section 404(p) promises 404 permittees that their activities in compliance with a permit will not

be subject to challenge, and section 404(q) requires the Corps and EPA to work cooperatively to promptly resolve disagreements so that permittees will not be held hostage to inter-agency disputes. Had Congress authorized EPA to act under section 404(c) post-permit, Congress would have said something in section 404(p) about what effect such action would have on issued permits. And Congress's command in section 404(q) that permitting disputes be resolved expeditiously would be illusory if EPA could simply stay its hand and act long after the Corps issues a permit.

The legislative history confirms that section 404(c) does not authorize EPA to act post-permit. The chief sponsor of the legislation explained that EPA would act under section 404(c) "prior to the issuance of any permit," and nothing in the legislative history indicates that EPA could act *after* permit issuance.

The district court also correctly declined to defer under *Chevron* step two because, *inter alia*, both the Corps and EPA administer section 404. And even were deference appropriate, the "interpretation" to which EPA seeks deference is not an interpretation at all, but rather a bald, unreasoned assertion that it can act post-permit. Even according the non-trivial boost of *Skidmore* deference, EPA's "interpretation" is patently unreasonable, so the district court properly rejected it. Further, contrary to EPA's contention here, EPA has never before initiated 404(c)

action as to an issued permit, and no court has endorsed the radical notion that the statute authorizes such action.

Finally, the Court should decline EPA's invitation to consider the extensive statutory and factual issues Mingo Logan raised in Counts II through XIV, which the district court did not consider. Below, those issues were the subject of hundreds of pages of briefing about a massive administrative record. Should these issues need be reached at all, they should be addressed by the district court in the first instance.

STANDARD OF REVIEW

The district court's grant of summary judgment and its interpretation of section 404(c) are reviewed de novo. *Calloway v. Dist. of Columbia*, 216 F.3d 1, 5 (D.C. Cir. 2000).

ARGUMENT

I. Section 404(c) Does Not Authorize EPA to Modify an Issued Permit.

To determine EPA's authority under section 404(c), the Court first looks to the statute's text. *Chevron*, 467 U.S. at 843 n.9. The Court applies the "traditional tools of statutory construction," including the text and structure of the statute and its legislative history, to determine if the statute unambiguously expresses Congress's intent. *Id.*; *see also Bell Atl. Tel. Cos. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997). If the intent of Congress is clear, that is the end of the matter. *Chevron*, 467 U.S. at 842-43. Here, Congress's intent is clear.

By its plain terms, section 404(c) gives EPA no power over permits. It refers only to "specifications." The Corps specifies disposal sites during the permit process before the permit issues. Once the Corps issues a permit, the permit becomes the operative authorization; any "specifications" cease to exist independently and merge into the permit. That permit is the law as to the activities it authorizes. Indeed, the requirement to obtain permits that authorize discharges subject to project-specific conditions is the central regulatory feature of the CWA. Congress would not implicitly—and through a parenthetical phrase no less—grant EPA the extraordinary power to destroy a section 404 permit without using the word "permit." "Congress … does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Equally important, a reading of section 404(c) that grants EPA that power creates conflict with key provisions of the CWA and lacks any support in the legislative history.

A. Section 404(c) Addresses Only Specifications; It Does Not Mention Permits.

"[T]he starting point in any case involving the meaning of a statute[ ] is the language of the statute itself." *Grp. Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 210 (1979). Section 404 states:

> **(a) Discharge into navigable waters at specified disposal sites**
>
> The Secretary [of the Army] may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. … .
>
> **(b) Specification for disposal sites**
>
> Subject to subsection (c) of this section, each disposal site shall be specified for each such permit by the Secretary (1) through the application of guidelines developed by the Administrator [of EPA], in conjunction with the Secretary … and (2) in any case where such guidelines under clause (1) alone would prohibit the specification of a site, through the application additionally of the economic impact of the site on navigation and anchorage.
>
> **(c) Denial or restriction of use of defined areas as disposal sites**
>
> The Administrator is authorized to prohibit the *specification* (including the withdrawal of *specification*) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for *specification* (including the withdrawal of *specification*) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary. … .

33 U.S.C. § 1344 (emphases added).

The text makes clear that Congress used the terms "permit" and "specification" advisedly—the Corps has power over permits, while EPA has power only over "specifications." Section 404(a) authorizes the Corps to issue permits, and section 404(b) directs the Corps to specify disposal sites "for each such permit" by applying guidelines developed by EPA. Section 404(c) allows EPA only to prohibit, deny, restrict, or withdraw "*specifications*."

The absence of the word, "permit," in section 404(c) is significant. As explained above, "permits" that authorize discharges and govern the permittee's conduct are the CWA's central regulatory feature. So throughout section 404, where Congress intended to refer to permits, it used that word: Section 404(a) authorizes the Corps to "issue *permits*;" section 404(b) tells the Corps how to specify the disposal sites "for each such *permit*;" section 404(p) deems "[c]ompliance with a *permit* issued pursuant to this section" to be compliance with the CWA; and section 404(s) empowers the Corps to take enforcement action upon "violation of any condition or limitation set forth in a *permit*." 33 U.S.C. § 1344 (emphases added). But "permit" does not appear in section 404(c), and that alone strongly indicates that Congress did not intend through section 404(c) to give EPA any power over issued permits. *See Duncan v. Walker*, 533 U.S. 167, 173-74 (2001) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that

Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotations omitted).[8]

EPA argues in response that section 404(c) must give it power as to issued permits, because section 404(c) allows it to "withdraw" "any" specification "whenever" it will have unacceptable adverse effects. EPA Br. at 24-32. EPA acknowledges, as it must, that "specification" and "permit" mean different things, and that Congress was well aware when it passed section 404 that some disposal sites are specified wholly outside of the CWA permitting context.[9] *See* EPA Br. at

[8] Also significant is the placement of "withdrawal of specification" in two parenthetical phrases. These parenthetical phrases are "so poorly written that it is difficult to ascertain what it is they are supposed to modify." [Op. at 12-13]. While they appear to contemplate that EPA will have some authority to "withdraw" specifications, their placement in parentheticals suggests they were a drafting afterthought. As the district court concluded, the best explanation of the parentheticals is that they were meant to address disposal sites specified by the Corps before 1972 under the RHA. In any event, it is telling that virtually every time EPA purports to recite the language of section 404(c), EPA omits the parentheses and re-phrases the language by stating that the statute allows EPA "to withdraw[]" the Corps's specification. *See, e.g.*, EPA Br. at 2, 24, 25, 27.

[9] EPA's own regulations establishing guidelines for specifications under section 404(b)(1) explain that specified disposal sites exist apart from the Corps permitting process. In 40 C.F.R. § 230.2, EPA identifies five sources for specifications including (1) the Corps's regulatory program under CWA sections 404(a) and (e); (2) the Corps's civil works program; (3) permit programs of States under CWA sections 404(g) and (h); (4) statewide dredged or fill material regulatory programs approved under CWA sections 208(b)(4)(B) and (C); and (5) federal construction projects which meet criteria specified in CWA section 404(r). Several of these sources have nothing to do with permits issued under section 404(a).

31 & n.10. EPA nonetheless argues that, in order for the word "withdraw" to have any meaning, there must be a specification to withdraw, and specification only occurs with the issuance of a section 404 permit. And, based on words like "whenever" and "any," EPA argues section 404(c) should be given an expansive construction. The district court considered each of these textual arguments and properly rejected them.

1. "Specification" Is Not Shorthand for "Permit."

The twin pillars of EPA's textual argument are its bald assertions (1) that "[s]ection 404(a) and (b) explain that the Corps specifies disposal sites *in* permits," EPA Br. at 26 (emphasis added), *see also* EPA Br. at 31 ("'specification' covers the same ground" as permit); and (2) that "specifications" survive as distinct authorizations after a permit issues, and they can be "withdrawn" regardless of the effect on a permit, *see* EPA Br. at 26 ("specification must survive permit issuance"). So, argues EPA, if (a) section 404(c) gives it the power to withdraw specifications, (b) specifications are only made through the act of issuing a permit,

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And in its regulations creating a procedure for identifying possible future disposal areas, EPA treats "permits" and "specifications" as distinct concepts. *See* 40 C.F.R. § 230.80 (stating that such advance site identifications "should not be deemed to constitute a *permit* for the discharge of dredged or fill material within such area *or* a *specification* of a disposal site") (emphases added).

and (c) specifications survive the issuance of a permit, then EPA must have the power to modify a permit by withdrawing its specifications. *Id.* at 26-27.

EPA is wrong. "Specification" is not shorthand for "permit." "Specify" means simply "to mention, describe, or define in detail." Webster's New World Dictionary of the American Language 1367 (2d College Ed. 1986). Unlike "permit," which means "to allow; consent to," *id.* at 1060, "specify" connotes no authorization to act. "Specification" therefore is merely the act of describing a location to put dredged or fill material, and it occurs either outside the permitting context altogether or as one step on the way to the issuance of a permit. In the permitting context, once a permit issues, the specifications of disposal sites merge into the permit itself.

a. Specification of a Disposal Site Occurs Before a Permit Is Issued.

Sections 404(a) and (b) contemplate that specification will occur *before* a permit is issued. Section 404(a) states: "The [Corps] may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at *specified disposal sites*," and section 404(b) states that "each such disposal site *shall be specified for each such permit*" through application of the section 404(b)(1) Guidelines. 33 U.S.C. § 1344(a)-(b) (emphases added). Had Congress meant to conflate the description of the site to be authorized as a disposal area with the actual authorization to discharge, Congress

would not have said in section 404(b) that "each such disposal site shall be specified *for* each such permit" (emphasis added)—it would have said "in," "through" or "by." So, as the district court recognized, the act of specifying disposal sites is a predicate to the issuance of a permit—it does not occur magically the moment the permit issues. [Op. at 10-12].

The structure of sections 404(a)-(b) bear this out. Section 404(a) requires notice and opportunity for public comment before a permit can issue and, in order for that opportunity to be meaningful, requires that the notice describe in detail (i.e., specify) the proposed disposal site(s). *See* 33 C.F.R. § 325.3(a)(4) and (6) (requiring public notice to describe the location of the activity and a "plan and elevation drawing showing the general and specific site location and character of all proposed activities").[10] Section 404(b) requires that disposal sites be specified "through the application of [the section 404(b)(1)] guidelines," and the Corps's regulations require that the Corps apply the section 404(b)(1) Guidelines before it can issue a permit. "[N]o 404 permit can be issued unless compliance with the 404(b)(1) guidelines is demonstrated (i.e., compliance is a prerequisite to

[10] The regulations track the process described by Senator Muskie. He explained that EPA's consideration under section 404(c) "is not duplicative or cumbersome because the permit application transmitted to the Administrator for review will set forth both the site to be used and the content of the matter of the spoil to be disposed." Senate Consideration of the Report of the Conference Committee (Oct. 4, 1972), *reprinted in* 1 LEGISLATIVE HISTORY 1972 at 177.

issuance)." 49 Fed. Reg. 39,478, 39,479 (Oct. 5, 1984); *see also* 33 C.F.R. § 323.6(a) (stating that the Corps cannot issue a permit unless it first "determines that the proposed discharge would comply with the 404(b)(1) guidelines"). As a final step in the permit process and "prior to final action on the application," the Corps must prepare a Statement of Findings, which sets forth the Corps's determination of compliance (or not) with the section 404(b)(1) Guidelines. 33 C.F.R. § 325.2(a)(6). Thus, specification necessarily precedes permit issuance.[11]

One example of a pre-permit process that gives EPA multiple opportunities to review (and "withdraw") Corps-specified disposal sites is the 404(q) MOA. The MOA creates an extensive coordination process during which EPA can review the Corps's statement of findings/record of decision (including the Corps's section 404(b)(1) Guidelines analysis) prepared in support of the permit. If EPA remains concerned, it can either elevate its concerns, 404(q) MOA at Part IV ¶¶ 3(d), (f), or initiate section 404(c) proceedings. Tellingly, the Corps regulations governing the final steps in the permitting process describe EPA 404(c) action at this stage as

[11] Indeed, a key goal of the section 404 permitting process is to identify "the least environmentally damaging practicable alternative" location for the discharge of dredged and fill material. Toward that end, the application and the public notice are both required to identify proposed disposal site locations. 33 C.F.R. § 325.1(d)(4), 325.3(a)(6), and the Corps is required by the section 404(b)(1) Guidelines to conduct a rigorous analysis of alternative locations. 40 C.F.R. § 230.10(a).

providing notice of an intent to "prohibit *or withdraw* the specification." *See* 33 C.F.R. § 323.6(b) (emphasis added). If EPA initiates a section 404(c) proceeding, the Corps holds the proposed permit decision in abeyance. *Id.*; 404(q) MOA at Part IV ¶¶ 3(d)-(e). Thus, contrary to EPA's claim here, there is a specification to be "withdrawn" before the permit has been issued.

And once the permit issues, there is no longer a discrete "specification," but rather a comprehensive, integrated "permit" that authorizes the discharge of dredged and fill material in accordance with myriad terms and conditions. EPA's contention that, even after the permit issues, the permittee "can only dump … in areas that are specified" is inaccurate. [Op. at 17]. As the district court explained, "[i]t is true that a permit can only be *issued* for specified areas, but the issued permit does not make reference to 'specification.'" [*Id.* at n.9].

b. Disposal Sites Existed at the Time the CWA Was Passed.

The law in place when Congress amended the CWA in 1972 sheds additional light on Congress's intent behind section 404(c)'s two parenthetical phrases.[12] In its pre-1972 regulations governing the disposal of dredged spoil

[12] "'[C]ourts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it.'" *See Leo Sheep Co. v. United States*, 440 U.S. 668, 669 (1979) (quoting *United States v. Union Pac. R.R. Co.*, 91 U.S. 72, 79 (1875)).

under the RHA, the Corps listed disposal sites it had specified over many years for the discharge of material. *See* 33 C.F.R. pt. 205 (1972). These pre-CWA sites, each with its own requirements, were located throughout the country, including New York Harbor, Chesapeake Bay, the Great Lakes, certain rivers and harbors, and approaches to seaports off both coasts. Congress thus understood in 1972 that these specified disposal sites existed wholly apart from section 404 permits.[13] Indeed, it enacted section 401(c) of the 1972 amendments to authorize the Corps to "permit the use of spoil disposal areas under [its] jurisdiction by Federal licensees or permittees." *See* 33 U.S.C. § 1341(c). This reaffirmed the Corps's authority over the disposal sites then in use and authorized the Corps to use those sites in its section 404 permitting program. Accordingly, some "specifications" existed independently of CWA permits. They were "on the shelf" for the Corps to use in a section 404 permit, and they continued in use regardless of whether the Corps ever issued a section 404 permit at those specified sites.

But the existence of these sites created a potential gap in section 404(c)'s coverage because those specifications could no longer be "prohibited" or "denied."

[13] When he introduced the first version of what would become section 404, Senator Ellender made clear that "specified disposal sites" referred to "open water disposal areas" and "diked disposal areas" that the Corps maintained independently of the § 404 program. Senate Debate on S. 2770 (Nov. 2, 1971), *reprinted in* 2 LEGISLATIVE HISTORY 1972 at 1386.

By its parenthetical, "(including the withdrawal of specification)," Congress closed that gap. It made clear that EPA going forward could withdraw those areas specified as disposal sites, including sites that had been designated before section 404(c) was enacted. [Op. at 13 n.6]. Thus, the word "withdrawal" in section 404(c) has meaning without resorting to EPA's tendentious argument that specified disposal sites magically appear at the moment the permit issues and not before.

EPA responds that interpreting the parenthetical phrases to refer solely to disposal sites specified before 1972 would give the word "specification" two different meanings in the statute. Not so. "Specification" means the same thing throughout section 404(c)—i.e., the "definition in detail" of a site that could be authorized as a disposal area for the discharge of dredged and fill material. But, contrary to EPA's argument, "specification" does not mean "permit." Once the permit issues, there is a permit with terms and conditions protected by section 404(p), and section 404(c) does not authorize EPA to withdraw, modify or take any other action with respect to that permit.

2. "Whenever" and "Any" Do Not Transform the Meaning of "Specification."

The words "whenever" and "any" do not transform section 404(c) from authorizing EPA to act regarding specifications into authorizing EPA to withdraw or modify permits. As the district court properly recognized, the use of "whenever" in section 404(c) does not support the sweeping power that EPA

would claim. It more likely was intended "simply to convey the meaning that the EPA may act 'at such time as' it makes the necessary determination—in other words, that the determination is the predicate for the action." [Op. at 13].

More critically, both of these words expressly relate to "specifications," not permits. At most, section 404(c) authorizes "withdrawal of specification" of "any defined area as a disposal site." It says nothing about modifying permits. So to accept EPA's theory, the Court must conflate the two words specification and permit. But as set forth above, these terms do not have the same meaning. *See* supra 28-34. EPA responds here, as it did in the district court, that it is merely withdrawing specifications, just ones that happen to be contained in a section 404 permit. "But that innocent pose is entirely disingenuous since EPA also insists that its action absolutely had the legal effect of invalidating Mingo Logan's permit for the streams that are no longer specified. EPA cannot have it both ways." [Op. at 15 (citation omitted)].

B. EPA's Interpretation Conflicts with the Statute as a Whole.

The Court must read section 404(c) in light of the statute as a whole.[14] EPA's interpretation, already deeply problematic as a textual matter, becomes untenable when its effects on other provisions of the Act are considered.

[14] *United States v. Heirs of Boisdoré*, 49 U.S. (8 How.) 113, 122 (1850) ("In expounding a statute, we must not be guided by a single sentence or member of a

At the most fundamental level, EPA's reading obliterates the choice Congress made to give the permitting authority with all of its attributes to the Corps, not EPA. Rather than effect Congress's compromise that gives the Corps overall responsibility over the permitting program while giving EPA a significant but carefully prescribed role in the pre-permit evaluation process, EPA would arrogate to itself one of the key powers belonging to a permitting authority—the power to modify or revoke a permit. EPA's encroachment on the Corps's authority could not be more plain. EPA asked the Corps to use its power to modify or revoke the Permit; the Corps said no; EPA nevertheless attempts to do so on its own.

EPA's interpretation also tramples on provisions like sections 404(p) and 404(q) that are intended to give permits certainty and finality. EPA's boundless reading renders illusory the finality that the section 404(q) process is meant to

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sentence, but look to the provisions of the whole law, and to its object and policy."); *see also Am. Fed'n of Gov't Employees, Local 2782 v. Fed. Labor Relations Auth.*, 803 F.2d 737, 740 (D.C. Cir. 1986) ("[S]tatutes or regulations are to be read as a whole, with each part or section ... construed in connection with every other part or section." (internal quotations omitted)); *Nat'l Ass'n of Mfrs. v. U.S. Dep't of the Interior*, 134 F.3d 1095, 1107 (D.C. Cir. 1998) ("[A]n interpretation, [that] essentially deprives one provision of its meaning and effect so that another provision can be read as broadly as its language will permit, is inconsistent with the Congress's intent … .").

achieve, and it destroys the certainty that provisions like section 404(p) are intended to provide permit holders.

1. EPA's Reading Creates Untenable Conflict With Section 404(p).

Congress's central policy innovation in the CWA was to require dischargers to obtain permits but then to assure them, through sections 402(k) and 404(p) that if they comply with the permit and all its project-specific conditions, they will comply with the CWA. *See* 33 U.S.C. §§ 1342(k), 1344(p). "[O]nce a Section 404 permit has been issued, the permittee's obligation to comply with the regulatory scheme of the Clean Water Act is determined by referring to the terms and conditions of the Section 404 permit." *Coeur D'Alene Lake v. Kiebert*, 790 F. Supp. 998, 1007-08 (D. Idaho 1992) (citing 33 U.S.C. § 1344(p)). If the permittee violates the permit, the Corps may pursue administrative or civil enforcement. 33 U.S.C. § 1344(s). Or, if "considerations of the public interest" warrant such action, the Corps may take administrative action to modify, suspend or revoke a permit. 33 C.F.R. § 325.7. But absent such permit violations or public interest considerations, the permittee can rely on the permit shield of section 404(p).

EPA does not claim that Mingo Logan has failed to comply with its Permit. Under section 404(p) Mingo Logan should be able to rely on its Permit to continue its lawful operations. Moreover, the Corps rejected EPA's request to suspend,

modify or revoke the Permit because under 33 C.F.R. § 325.7,[15] there are no grounds to do so. So the Permit remains operative.

Unless that Permit is actually modified *by the Corps*, section 404(p) says that Mingo Logan can discharge in accordance with its terms without violating the Act.[16] Yet EPA purports to prohibit Mingo Logan from operating in accordance

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[15] The Corps's regulations identify five factors relevant to whether to take the extraordinary step of modifying a permit:

> [1] the extent of the permittee's compliance with the terms and conditions of the permit;
>
> [2] whether or not circumstances relating to the authorized activity have changed since the permit was issued or extended, and the continuing adequacy of or need for the permit conditions;
>
> [3] any significant objections to the authorized activity which were not earlier considered;
>
> [4] revisions to applicable statutory and/or regulatory authorities; and
>
> [5] the extent to which modification, suspension, or other action would adversely affect plans, investments and actions the permittee has reasonably made or taken in reliance on the permit.

33 C.F.R. § 325.7(a). EPA's interpretation would allow it to override a permit without regard to the permittee's reliance interest, compliance with the permit or the economic consequences of EPA's action. *See* 40 C.F.R. pt. 231.

[16] Precisely because the Corps alone has the power to modify, suspend or revoke permits, EPA rejected a proposed regulation governing the emergency exercise of section 404(c) authority that would have given EPA the authority to suspend the permit itself. 44 Fed. Reg. at 58,077-78.

with the Permit. What is Mingo Logan to do? Judge Jackson explored just this question in an extended exchange with counsel for EPA, and came away with no satisfactory response. [Op. at 17-18]. At bottom, neither section 404(c) nor section 404(p) contemplates this unacceptable scenario. And on an issue so fundamental to the CWA—i.e., the permit holder's ability to rely on the permit—Congress surely would have addressed this scenario explicitly if section 404(c) actually gave EPA power to revoke or modify issued permits. [*Id.* at 18].

On appeal, EPA does not address the patent conflict that its reading of section 404(c) creates with section 404(p). It instead argues that the text of section 404(p) is at odds with the district court's reading. EPA notes first that section 404(p) makes no mention of section 404(c) or specifications. But that's just the point—section 404(p) would have referenced section 404(c) if section 404(c) actually gave EPA the power to modify permits. And that also is the problem with EPA's argument that section 404(p), which was enacted five years after section 404(c), cannot be read to implicitly overturn section 404(c). EPA Br. at 34 (citing *Vill. of Barrington, Ill. v. Surface Transp. Bd.*, 636 F.3d 650, 662 (D.C. Cir. 2011)). That argument only works if one assumes that the text of section 404(c) clearly and unambiguously gave EPA the power to act post-permit. But it is fair to infer that Congress did not believe that section 404(c) gave EPA any power over

existing permits; otherwise, it would have addressed how section 404(p)'s permit shield would apply in the scenario presented here.

EPA next argues that section 404(p) does not give permit holders "*carte blanche*" because CWA section 504 gives EPA the power to bring suit to stop discharges if they are posing "an imminent and substantial endangerment" to the public health or welfare. EPA Br. at 33 (citing 33 U.S.C. § 1364). But the differences between section 504 and section 404(c) undermine EPA's point—section 504 expressly states that it trumps other provisions of the statute; section 404(c) does not.

Finally, EPA notes correctly that the Corps can modify a permit even if the permit holder has complied with the permit's terms. True enough, but in that circumstance, the Corps actually modifies or revokes the permit, so there is no confusion over what the permit authorizes or what section 404(p) protects.

2. EPA's Interpretation Undermines Finality That Section 404(q) Is Meant to Achieve.

EPA's interpretation also undermines the purpose of section 404(q), which requires the Corps and EPA to enter into agreements to minimize duplication and delays in permit issuance. Section 404(q) commands that such agreements assure "a decision with respect to an application for a permit under [section 404(a)] will be made *not later than the ninetieth day after the date the notice for such*

application is published." 33 U.S.C. § 1344(q) (emphasis added).[17] This statutory requirement would be meaningless if EPA could simply wait until the permit issues and then invoke section 404(c) at any time in perpetuity to modify the issued permit.[18] EPA has agreed that its comments to the Corps regarding compliance with the section 404(b)(1) Guidelines "will be submitted within the time frames established in this agreement and applicable regulation." 404(q) MOA at Part I ¶ 2. "What would be the point of insisting upon expedition in granting permits if a permit isn't worth the paper it's printed on and commerce could be interrupted at any time?" [Op. at 19].

EPA cannot deny this patent conflict and makes no meaningful attempt to do so. All it says is that, like section 404(p), section 404(q) was enacted after section

[17] Section 404(q) was enacted in 1977 in response to widespread and significant permitting delays under the 1972 provisions. *See, e.g.*, S. REP. NO. 95-370, 95th Cong. 1st Sess. (July 28, 1977), *reprinted in* 4 A LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977 at 633, 713 (Oct. 1978) (LEGISLATIVE HISTORY 1977). Congress thus focused on accelerating interagency coordination during permit review and reducing "redtape and delay." *See* Senate Debate, Clean Water Act of 1977 - Conf. Rpt. (Dec. 15, 1977), *reprinted in* 3 LEGISLATIVE HISTORY 1977 at 425, 531.

[18] As EPA Administrator Ruckelshaus recognized, public policy favors an assurance that there will be "a cut-off point regarding any possible review of newly issued permits." Administration Testimony, Hearings on H.R. 11896, Committee on Public Works, U.S. House of Representatives (Dec. 7, 1972), *reprinted in* 2 LEGISLATIVE HISTORY 1972 at 1111, 1186, 1205 (statement of EPA Adm'r William D. Ruckelshaus).

404(c). For the reasons explained above, that fact, if anything, undermines EPA's reading.

C. Legislative History Confirms Mingo Logan's Reading.

The legislative history confirms that Congress intended EPA to act under section 404(c), if at all, prior to permit issuance. The most direct and relevant legislative history appears in Senator Edmund S. Muskie's statement on the floor of the Senate. *See* Senate Consideration of the Report of the Conference Committee (Oct. 4, 1972), *reprinted in* 1 LEGISLATIVE HISTORY 1972 at 161-339. Senator Muskie was Chairman of the key Senate committee, chief sponsor of the 1972 Amendments, and leader of the Senate delegation in the Conference Committee. In his presentation of the Report of the Committee of Conference, he noted that EPA would retain certain authority under section 404(c), which he explained as follows:

> *[P]rior to the issuance of any permit* to dispose of spoil, the Administrator must determine that the material to be disposed of will not adversely affect municipal water supplies, shellfish beds, and fishery areas (including spawning and breeding areas), wildlife or recreational areas in the specified site. *Should the Administrator so determine, no permit may issue.*

Id. at 177 (emphases added). He explained further that:

> The conferees were uniquely aware of the process by which the dredge and fill permits are presently handled and did not wish to create a burdensome bureaucracy in light of the fact that a system to issue permits already

> existed. At the same time, the Committee did not believe there could be any justification for permitting the Secretary of the Army to make determination[s] as to the environmental implications of either the site to be selected or the specific spoil to be disposed of in a site. Thus, the Conferees agreed that the Administrator of the Environmental Protection Agency should have the veto over the selection of the site for dredged spoil disposal and over any specific spoil to be disposed of in any selected site.
>
> The decision is not duplicative or cumbersome *because the permit application transmitted to the Administrator for review* will set forth both the site *to be used* and the content of the matter of the spoil to be disposed. The Conferees expect the Administrator *to be expeditious* in his determination as to whether a site is acceptable or if specific spoil material can be disposed of at such site.

Id. (emphases added).

These statements, as the district court noted, explained the compromise between the House version of the bill, which insisted on the Corps's primacy over the discharge of dredged and fill material consistent with historical practice, and the Senate version of the bill which would have given EPA authority over those discharges. The fact that, in explaining just what role EPA would have under section 404, Senator Muskie described that role in terms that suggest action only in the pre-permit period, strongly suggests that Congress did not intend for EPA's section 404(c) authority to extend beyond the issuance of a permit.

EPA's discussion of the legislative history is notable for what it lacks. EPA has identified nothing that suggests Congress intended to give EPA the

extraordinary power to modify section 404 permits issued by the Corps. If Congress so intended, one would expect to see some mention of it in the legislative history, especially given Congress's careful consideration of the respective roles of the Corps and EPA.

EPA instead wrongly accuses the district court of "resort[ing] to legislative history to cloud a statutory text that is clear." EPA Br. at 37 (internal quotation marks and citation omitted). The court did no such thing. The court quite clearly held that EPA's interpretation was at odds with the statute's text, when read in light of the statute as whole. [Op. at 25]. The legislative history merely confirmed the validity of that conclusion.

EPA also tries to diminish the salience of Senator Muskie's statements. EPA Br. at 38-39. EPA does not dispute that Senator Muskie expected that EPA would act under section 404(c) prior to the issuance of a permit. And, as a chief sponsor and drafter of the CWA, Senator Muskie's contemporaneous understanding of the CWA's provisions is powerful evidence of Congressional intent that is routinely cited as the most reliable summary of EPA's role in section 404. *See* Admin. Auth. to Construe § 404 of the Fed. Water Pollution Control Act, 43 Op. Att'y Gen. 197, 199-200 (1979) (saying that"[t]he EPA responsibilities [under Section 404] were perhaps best summarized by Senator Muskie"); *James City Cnty., Va. v. EPA*, 955 F.2d 254, 261 (4th Cir. 1992) (same).

EPA nonetheless argues here that the remarks of a "single legislator" are not controlling. EPA Br. at 38-39. But even if Senator Muskie were just another "single legislator," that does not mean such statements would be irrelevant, just that they would be less persuasive *if* there were more powerful forms of legislative history that provided conflicting evidence of legislative intent. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979). But EPA points to none.[19]

D. The Fourth Circuit Did Not "Hold" That EPA Can Act After a Permit Has Been Issued.

EPA—for the first time—argues on appeal that the Fourth Circuit "held" that EPA can act under section 404(c) after the Corps has issued a permit. *See* EPA Br. at 40-41 (citing *James City County*). The Fourth Circuit held no such thing—it never even discussed the issue. That, no doubt, is why EPA made no such argument to the district court.

[19] Amici curiae West Virginia Highlands Conservancy, et al. argue that various characterizations of EPA's section 404(c) power as the power to "veto" permits shows that Congress intended to grant EPA the power to revoke the discharge authorization of an issued permit. *See* Envtl. Groups' Br. at 14-16. But "veto"—a term not appearing in the statute—does not connote the power to revoke an authorization that has the force of law—it means "to refuse to admit or approve." *See* http://www.merriam-webster.com/dictionary/veto. The President, for example, cannot veto laws already on the books. His veto power is limited to acts that have been passed by both houses of Congress and presented to him for signature *before they become effective*.

EPA, in *James City County*, had acted under section 404(c) *before* the Corps issued any permit, and the applicant filed suit challenging EPA's section 404(c) decision. The district court, in its order setting aside EPA's section 404(c) veto, refused to remand the matter to EPA and directed the Corps to issue the permit. *See James City Cnty., Va. v. EPA*, 758 F. Supp. 348, 353 (E.D. Va. 1990), *aff'd in part* 955 F.2d 254 (4th Cir. 1992). The Fourth Circuit ultimately set aside that order and remanded the veto to EPA for further consideration. But the Fourth Circuit did not, at any point in its decision, address the question presented here. EPA's brazen assertion that the Fourth Circuit even discussed this question—much less issued any holding on it—is thus patently false.[20]

II. The Court Should Not Defer to EPA's Interpretation.

As an alternative to its holding that EPA's interpretation of section 404(c) fails under *Chevron* step one,[21] the district court proceeded to *Chevron* step two and concluded that EPA's interpretation was entitled to no more than *Skidmore* deference and, in all events, was unreasonable. EPA argues on appeal its interpretation is reasonable and should have been accorded full *Chevron* deference.

[20] EPA argued in the court below that three other courts have considered this issue and have resolved it in EPA's favor. [Op. at 23-25]. The district court correctly recognized that the language EPA lifted from these cases was dicta, and EPA has not challenged that aspect of the district court's decision on appeal.

The only place where EPA articulates anything approaching a reasoned interpretation of the temporal scope of section 404(c) is the preamble to its 1979 section 404(c) regulations. *See* 44 Fed. Reg. 58,076 (Oct. 9, 1979). But that interpretation would allow EPA to act post-permit only if there is "substantial new information … first brought to the Agency's attention after [permit] issuance." *Id.* at 58,077. EPA pointedly does not seek deference to the interpretation reflected there, and specifically disavows the "substantial new information" predicate for post-permit action. [Op. at 30]. Instead, EPA asks the court to infer its interpretation based on passing references in its regulations, some of which EPA contends contemplate post-permit action, and various passages from other regulatory pronouncements. EPA Br. at 46-50. That "interpretation," says EPA, would allow EPA to act post-permit even where the basis for action was fully considered before the permit issued. [Op. at 30].[22]

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[21] EPA wrongly asserts that the district court did not reject EPA's interpretation under *Chevron* step one. *See* EPA Br. at 20.

[22] On appeal, EPA tries to back away from its expansive view of section 404(c) and intimates that EPA exercises post-permit authority when "necessary in unusual circumstances" where new information has emerged. EPA Br. at 8. But EPA clearly eschewed any such restriction below, [Op. at 30], and it cannot seek reversal now based on a position that it rejected in the trial court. *Potter v. Dist. of Columbia*, 558 F.3d 542, 547 (D.C. Cir. 2009) ("[T]his court reviews only those arguments that were made in the district court, absent exceptional circumstances."). Further, for the reasons recognized by the district court and

The district court considered and rejected this argument. First, the court concluded that, because section 404 is administered by multiple agencies, EPA's interpretation was entitled to, at most, *Skidmore* deference (i.e., a "non-trivial boost"). [Op. at 26-27]. Second, the court concluded that EPA's unconstrained interpretation of its power was unreasonable. The court noted specifically that EPA's interpretation, which contemplated the "non-revocation revocation" of permits, was "illogical and impractical" because it "would leave permittees in the untenable position of being unable to rely upon the sole statutory touchstone for measuring their Clean Water Act compliance: the permit." [Op. at 31]. The court also found EPA's interpretation unreasonable because it "sow[ed] a lack of certainty into a system that was expressly intended to provide finality." *Id.*

On appeal, EPA argues that it is entitled to full *Chevron* deference, notwithstanding the Corps's role under section 404. EPA also attempts to defend the reasonableness of its interpretation based both on its substance and the length of time it has been on the books. EPA is wrong across the board.

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discussed throughout this brief, even that more limited interpretation runs afoul of the statute.

A. Full *Chevron* Deference Is Inappropriate Where Multiple Agencies Are Charged With Administering a Statute.

Where multiple agencies are charged with administering a statute, a single agency's interpretation of that statute is not entitled to *Chevron* deference. *See Grant Thornton, LLP v. Office of Comptroller of the Currency*, 514 F.3d 1328, 1331 (D.C. Cir. 2008); *Collins v. Nat'l Transp. Safety Bd.*, 351 F.3d 1246, 1253 (D.C. Cir. 2003); *Salleh v. Christopher*, 85 F.3d 689, 691-92 (D.C. Cir. 1996); *Rapaport v. U.S. Dep't of the Treasury, Office of Thrift Supervision*, 59 F.3d 212, 216-17 (D.C. Cir. 1995). The alternative "would lay the groundwork for a regulatory regime in which either the same statute is interpreted differently by the several agencies or the one agency that happens to reach the courthouse first is allowed to fix the meaning of the text for all." *Rapaport*, 59 F.3d at 216-17. In such multiple agency situations, a single agency's determination is given, at most, *Skidmore* deference. [Op. at 26-27].[23]

EPA argues that this line of authority does not apply because EPA has exclusive authority over section 404(c). EPA Br. at 51-52, 54-55. But this is precisely the argument this Court rejected in *Salleh*, a case that EPA all but

[23] The district court correctly noted that this Court has held, in some cases, that a single agency's interpretation is reviewed de novo in such multiple agency scenarios. *See Grant Thornton*, 514 F.3d at 1331. But the Court need not resolve this apparent tension. Even according EPA the "non-trivial boost" that *Skidmore* offers, EPA's interpretation still falls short.

ignores. There, section 610(a)(1) of the Foreign Service Act empowered the Secretary of State to separate employees from the foreign service. *Salleh*, 85 F.3d at 690-91. Viewed in isolation, the Secretary's power was plenary. *Id.* at 691. But section 610(a)(2) provided that career employees could not be separated until cause for separation is established at a hearing before the Foreign Service Grievance Board. *Id.* (quoting 22 U.S.C. § 4010(a)(2)). The Secretary interpreted section 610(a)(1), the terms of which did not limit the Secretary's authority, to allow the Secretary to override a Board determination that cause had not been established. The Secretary sought *Chevron* deference, because he was interpreting section 610(a)(1) alone, which only gives power to the Secretary. *Id.* The D.C. Circuit declined to defer and observed that "both the Secretary and the Board have been delegated authority under two sequential provisions of section 610(a). To determine their respective authority, the whole section must be interpreted." *Id.* at 692.

EPA gets no *Chevron* deference here for the same reason. As in *Salleh*, two agencies have authority in sequential subsections of the same statute. The Corps has concluded, based on its authority under sections 404(a) and (b), that permits should be modified only after consideration of the factors specified in 33 C.F.R. § 325.7, while EPA would modify a permit based on other factors not called out in the Corps's regulations, *see* 40 C.F.R. pt. 231. The conflict here is thus directly

analogous to the conflict in *Salleh*, where the Board had interpreted section 610(a)(2) to allow termination only through a showing of cause, while the Secretary interpreted section 610(a)(1) to allow termination without showing cause. Deference to one agency's interpretation of the statute over that of another is thus inappropriate.

B. The Corps Has Not Endorsed EPA's Interpretation.

EPA suggests that the Corps has agreed with EPA's interpretation of section 404(c). EPA Br. at 12. This agreement, says EPA, makes deference appropriate. *Id.* at 55. But none of the documents cited by EPA—the content of which EPA avoids discussing—show anything approaching a reasoned administrative interpretation by the Corps that endorses EPA's position.

EPA first points to its own preamble to the section 404(b)(1) guidelines. But that preamble is not authored by the Corps. *See* 45 Fed. Reg. 85,336 (Dec. 24, 1980) (identifying EPA as the author of the preamble).

EPA next cites a Corps internal memorandum from 1985 (the Edelman memo),[24] in which the Corps's Chief Counsel responds to a "memorandum of 19 April." EPA did not submit this "memorandum of 19 April" in the court below,

[24] EPA Br. at 12; [Doc. 80, United States' Notice of Supplemental Authority at 2 & Doc. 80-1, Ex. A, Mem. from Lester Edelman, Chief Counsel, Dep't of the Army for the Assistant Sec'y of the Army (Civil Works) (June 7, 1985)].

and the Edelman memo itself does not re-state the concerns raised by the "memorandum of 19 April." But the issue appears to have been whether EPA can exercise its authority on a "case-by-case" basis and not whether EPA can exercise its authority after a permit has been issued. The memo emphasizes those portions of Senator Muskie's floor statement that explain that EPA's section 404(c) review will occur on a "permit-by-permit" basis and ultimately concludes that nothing "would be gained by a challenge of the existing EPA 404(c) regulations" because "EPA can find some legislative history support for an application-by-application approach to 404(c)." [*Id.* at 5]. Equally important, Mr. Edelman gives no reason for his passing remark that EPA can act under section 404(c) after the Corps issues a permit, and the legislative history he discusses is the same floor statement that demonstrates that Congress expected EPA to act *before* a permit has issued. *See* supra 42-43. The Edelman memo is not a reasoned interpretation of the statute but rather an internal strategy document setting forth Mr. Edelman's personal opinion about whether the Corps would "gain anything" by pursuing the issue apparently raised in the memorandum of 19 April. And it stops well short of endorsing EPA's interpretation. [*Id.* at 4 (noting that "Senator Muskie's goals may not have been fully achieved by EPA's regulations.")].

Finally, EPA points to a passage in the section 404(q) MOA—the same document that EPA's interpretation of section 404(c) renders all but meaningless.

See supra 40-42. As explained above, one of the key flaws in EPA's interpretation of section 404(c) is that it undermines the carefully crafted agreement reflected in the 404(q) MOA to ensure that permit applications are processed promptly. As part of that agreement, the Corps agreed not to issue a permit within 10 days after providing EPA with a copy of its Statement of Findings/Record of Decision, and if it does issue a permit, to condition the permit on the result of any 404(c) proceeding that EPA initiates within a 10-day waiting period after the conditional permit issues. If EPA had free rein to act after the permit was issued, this concession from the Corps would be unnecessary. Moreover, such a conditional permit differs markedly from the unconditional permit the Corps issued to Mingo Logan with no mention of any EPA authority to act. This hardly shows that the Corps has embraced EPA's interpretation.

And none of these authorities even attempts to resolve the conflict between the Corps and EPA regarding the criteria to be applied in determining whether to modify a Corps-issued permit. As explained above, the applicable regulations require the Corps to consider factors such as the permit holder's compliance and its economic investments made in reliance on the permit. *See* 33 C.F.R. § 325.7. But EPA's section 404(c) regulations do not consider either of these factors. *See* 40 C.F.R. pt. 231. In fact, the Permit the Corps issued to Mingo Logan here does not even hint that EPA has any authority to modify a permit. And most telling of all,

the Corps specifically concluded, in response to EPA's request, that Mingo Logan's Permit should not be modified. [Op. at 27 n.11].

C. Even Assuming EPA's Interpretation Were Eligible for *Chevron* Deference, That Interpretation Would Still Fail Because It Is Unreasonable.

Even if EPA's interpretation of section 404(c) qualified for *Chevron* deference, such deference would be appropriate only if the interpretation were reasonable. *See S. Co. Servs., Inc. v. FCC*, 313 F.3d 574, 579 (D.C. Cir. 2002). "Obviously, the court must not simply 'rubber stamp' the agency interpretation or transform deference into 'judicial inertia.'" *Investment Co. Inst. v. Conover*, 790 F.2d 925, 935 (D.C. Cir. 1986). An agency interpretation that would fundamentally revise the statutory scheme created by Congress is not "reasonable" and thus is not entitled to deference. *Am. Bar Ass'n v. FTC*, 430 F.3d 457, 468 (D.C. Cir. 2005). And the mere fact that an interpretation is one of "longstanding duration" does not insulate it from review for its reasonableness. "[A]n agency may not insulate itself from correction merely because it has not been corrected soon enough, for a longstanding error is still an error." *Summit Petroleum Corp. v. EPA*, Nos. 09-4318, 10-4572, 2012 WL 3181429, at *11 (6th Cir. Aug. 7, 2012); *see Rapanos v. United States*, 547 U.S. 715, 752 (2006) (rejecting suggestion that the age of an otherwise unreasonable interpretation can save it from review as "a

sort of 30-year adverse possession that insulates disregard of statutory text from judicial review").

Of course, to defer under *Chevron*, the Court must have something to which to defer. As discussed above, the preamble to EPA's 1979 regulations contains an "interpretation" which would limit EPA's post-permit power to those instances where substantial new information is brought to EPA's attention after the Corps issued the permit. *See* 44 Fed. Reg. at 58,077. But EPA has rejected that interpretation as a non-binding policy statement. EPA Br. at 45-46.

EPA instead asks the Court to defer to the interpretation that it claims is evident from its section 404(c) regulations, past regulatory pronouncements, and its history of regulatory action. The regulations themselves do not address the issue now before the Court, and the preamble has only a passing reference that EPA in this litigation now disavows. And none of the other statements or actions EPA cites articulate anything approximating an *interpretation* of section 404(c). This is not the kind of careful reasoning through years of rulemaking that justified deference in *Chevron*. *See Pub. Citizen, Inc. v. U.S. Dep't of Health & Human Servs.*, 332 F.3d 654, 661 (D.C. Cir. 2003) ("Because the manual thus contains no reasoning that we can evaluate for its reasonableness, the high level of deference contemplated in *Chevron's* second step is simply inapplicable."); *see also Christensen v. Harris Cnty.*, 529 U.S. 576, 587-88 (2000) (declining to apply

Chevron step two where regulation did not address ambiguity at issue in the case). Nor would the lesser *Skidmore* form of deference be appropriate. "[T]he mere promulgation of a regulation, without a concomitant exegesis of the statutory authority for doing so, obviously lacks 'power to persuade' as to the existence of such authority." *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 287 n.5 (1978).

At most, EPA has offered the unexplained conclusion that it can act under section 404(c) after a permit has issued, even based on information it fully considered pre-permit. For the many reasons discussed throughout this brief and identified by the court below, this interpretation runs counter to the express language, the statutory permitting scheme, the statutory goal of giving a permittee certainty, and Congress's allocation of responsibility for section 404 permits to the Corps.[25] It creates untenable tension between the authority vested in the Corps and

[25] EPA argues that the Court can defer under *Chevron*, so long as EPA's use of section 404(c) here is not unambiguously foreclosed by the statute. *See* EPA Br. at 46 (citing *E.R. Squibb & Sons, Inc. v. Bowen*, 870 F.2d 678, 684 (D.C. Cir. 1989)). But as the district court recognized, EPA's approach "would turn the [*Chevron*] inquiry on its head. The Court does not get to consider whether the agency's exercise of a power was arbitrary and capricious under the APA if under *Chevron*, the agency did not have the power to act in the first place." [Op. at 30 n.15]. The *Squibb* decision cited by EPA does not support a contrary conclusion. The Court there merely concluded unexceptionally that it need not consider the reasonableness of the interpretation offered by the party challenging the agency's determination in order to assess the reasonableness of the agency's interpretation. *Squibb*, 870 F.2d at 684.

that claimed by EPA—all to the detriment of the permit holder. The district court correctly rejected it as unreasonable.

Finally, EPA has no longstanding history of acting post-permit. In fact, it has never before done so.[26] *See* EPA Press Release, EPA Proposes Veto of Mine Permit Under the Clean Water Act (Mar. 26, 2010), *available at* http://www.epa.gov/newsroom.

III. This Court Should Not Consider Issues Raised in Counts II through XIV of Mingo Logan's Amended Complaint in the First Instance.

EPA invites this Court to address the substantial arguments raised in Counts II through XIV of Mingo Logan's amended complaint that the district court did not need to consider. EPA Br. at 56. The Court should reject that invitation.

Even if section 404(c) authorizes EPA to act four years after a permit has been issued, the scope of EPA's authority is limited and its burden is exacting. Section 404(c) does not authorize EPA to consider impacts from discharges authorized by CWA section 402 permits. (Count V). These section 402 discharges

[26] EPA's wrongly contends that it has acted under section 404(c) post-permit on two prior occasions—the "North Miami Landfill" veto and the "James City County" veto. As the district court explained, the North Miami Landfill veto "was actually in response to an application to modify the section 404 permit in question, and the site the EPA 'withdrew' was both specified in the existing permit and also proposed to be specified in the new modified permit." [Op. at 29 n.14 (citing 46 Fed. Reg. 10,203, 10,203-04 (Feb. 2, 1981)]. And in *James City County*, EPA acted before the Corps issued its permit. *See* supra at 45-46.

are regulated by WVDEP under the separate and distinct section 402 permitting program. But EPA bases its action in large degree on impacts from section 402 discharges. And section 404(c) certainly does not allow EPA to base a section 404(c) veto decision on its own *ad hoc* water quality criteria. West Virginia's water quality standards govern permitting decisions under the CWA. But EPA ignores the applicable standards in favor of its own newly-conceived water quality criteria for conductivity (Count VI), selenium (Count VII) and water quality parameters associated with the formation of golden algae (Count VIII). And EPA does not establish that any of these unlawful ad hoc standards will be violated by the permitted section 404 discharges, rather than from other mining activity that EPA has no authority to address under section 404(c). (Count X).

Even as to those impacts that EPA can lawfully consider under section 404(c), EPA has the burden to prove that the section 404 discharges will have an "unacceptable adverse effect" on wildlife. But the impacts EPA cites were studied exhaustively during the decades-long permitting process, (Counts II, III), and they certainly do not rise to the level of "unacceptable"— to the contrary, they are either routine or nonexistent. (Count XI). EPA also fails to consider the Permit's mitigation requirements, which will ensure that any effects are not unacceptable. Instead, EPA wrongly second-guesses the Corps's mitigation assessments even after the United States successfully defended the Corps's

mitigation reasoning in the Fourth Circuit. (Count XIV). Perhaps in an attempt to divert attention from the weaknesses of its actual bases for acting, EPA throws in a discussion of the section 404(b)(1) Guidelines, but disclaims any reliance on that discussion. And for good reason: not only does EPA lack authority to apply the Guidelines to modify a permit after it has been issued, EPA fails to meet its burden of establishing any non-compliance with the Guidelines. (Counts XIII and IX).

In the court below, the parties addressed these issues in more than 250 pages of briefing and recitations of undisputed facts and responses thereto. This Court should not foreclose litigation of these important issues based on five pages of summary discussion in EPA's Opening Brief.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the district court.

Respectfully submitted,

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